IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 184 of 2007
With
CRIMINAL MISC. APPLICATION Nos.186, 187 & 189 OF 2007

HONOURABLE MR.JUSTICE KS JHAVERI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DR. RAJAN SANATKUMAR JOSHI - Applicant(s)
Versus
RAJNIKANT GOVINDLAL SHAH & 1 - Respondent(s)

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Appearance :
DR. AMEE YAJNIK for Applicant
MR G RAMAKRISHNAN for Respondent no.1
MR PD BHATE & MRS HANSABEN PUNANI, APP, for Respondent no.2

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CORAM : HONOURABLE MR.JUSTICE KS JHAVERI

Date : 01/03/2007

ORAL JUDGMENT

1. By way of these petitions under section 482 of the Code of Criminal Procedure,1973, the petitioner has prayed to quash Criminal Cases No. 400 of 2006, 401 of 2006, 402 of 2006 and 403 of 2006 and the proceedings thereof, pending before the learned Metropolitan Magistrate, Court No.21, Ahmedabad.

2. The petitioner was appointed as Additional Director on 31st March 2003 of Dairy Den Limited, which is accused no.1 company. He resigned as Additional Director of the said Company on 15th December, 2003 with immediate effect.

3. Respondent no.1 in these petitions filed aforesaid three complaints against Dairy Den Limited and others, including the present petitioner, stating that the complainant had business relations with the said Company and during the course of transaction, the Company had issued three different cheques, which came to be dishonoured. Therefore, after issuance of notice, he has filed the said three complaints under section 138 of the Negotiable Instruments Act. In these petitions, the petitioner have prayed to quash those complaints.

4. Dr. Amee Yajnik, learned Advocate for the petitioner submitted that there is no allegation in the complaint that the present petitioner is looking after the administration, business and affairs of the

accused no.1 company; that the petitioner has not signed the instruments in question and that the cheques were dishonoured in the year 2005, whereas the petitioner had resigned from the Company on 15th December, 2003. She, therefore, submitted that prima facie no offence is made out against the petitioner and therefore the complaints deserve to be quashed.

5. Mr.P.D. Bhate and Mrs. Hansaben Punani, learned APPs appearing for the State submitted that the petitioner was Additional Director of the Company and, therefore, at this stage, the complaint cannot be quashed and only in trial the innocence of the petitioner can be proved. They, therefore, submitted that the petitions deserve to be rejected.

6. Mr. G. Ramakrishnan, learned Advocate for the original complainant submitted that the petitioner as Additional Director of the Company, was involved in the day-to-day affairs of the Company and, therefore, at this stage, it cannot be said that the complaint against him cannot be maintainable. He, therefore, submitted that this Court may not entertain the present petition.

7. Heard the learned Advocates for the parties and perused the relevant papers. As a result of this exercise, certain aspects are

undisputed. The petitioner was appointed as an Additional Director on 31st March, 2003 of Dairy Den Limited and that he resigned from the said post on 15th December, 2003 with immediate effect. Form No.32 as provided under the provisions of the Companies Act, 1956 was also filed with the office of the Registrar of Companies for recording of the said fact of resignation of the petitioner. Secondly, the cheques in question were signed by a Director of the accused no.1 company and there is no allegation that the petitioner has signed the said instruments. Thirdly, the instruments were dishonoured in the year 2005, long after the petitioner ceased to be an Additional Director of the said Company.

8. At this stage, it would be relevant to refer to section 138 and sub section (1) of Section 141 of the Negotiable Instruments Act, which reads as under:

> "138. Dishonour of cheque for insufficiency, etc. Of funds in the accounts.- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing tot he credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of

the cheque, or with both.

Provided that nothing contained in this section shall apply unless -

[a] the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

[b] the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within thirty days, of the receipt of information by him from the bank regarding the return of the cheque as unpaid, and

[c] the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation:- For the purpose of this section “debt or other liability” meansa legally enforceable debt or other liability.”

“141. Offences by companies – (1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly...

9. In the case of ***S.M.S. Pharmaceuticals Ltd. V. Neeta Bhalla & anr.*** reported in AIR 2005 SC 3512 (= (2005)8 SCC 89, 2005 AIR SCW 4740, 2005(127) Comp. Case 563, 2005 SCC (Cri) 1975) it has been held that it is necessary to aver that at the time the offence was committed, the person accused was in charge of and responsible

for the conduct of the business of the company. Paragraph 12 of the said order reads as under:

> "12. The conclusion is inevitable that the liability arises on account of conduct, act or omission on the part of a person and not merely on account of holding an office or a position in a company. Therefore, in order to bring a case within Section 141 of the Act the complaint must disclose the necessary facts which make a person liable."

10. Similar principle has been laid down in the case of ***Sabitha Ramamurthy & Anr. v. R.B.S. Channabasavaradhya*** reported in ***2006 AIR S.C.W. 4582.*** In a recent decision in the case of ***Saroj Kumar Poddar Vs State (NCT of Delhi)***, reported in ***2007(2) SCALE 36 (=2007 AIR SCW 656)*** the Apex Court has elaborately dealt with the issue involved in this petition and in paragraphs 14 and 15 it has been held as under:

> "14. Apart from the Company and the appellant, as noticed hereinbefore, the Managing Director and all other Directors were also made accused. The appellant did not issue any cheque. He, as noticed herein before, had resigned from the Directorship of the Company. It may be true that as to exactly on what date the said resignation was accepted by the Company is not known, but, even otherwise, there is no averment in the complaint petitions as to how and in what manner the appellant was responsible for the conduct of the business of the Company or otherwise responsible to it in regard to its functioning. He had not issued any cheque. How he is responsible for dishonour of the cheque has not been stated. The allegations made in paragraph 3, thus, in our opinion do not satisfy the requirements of Section 141 of the Act.
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> 15. Our attention, however, has been drawn to the averments made in paragraphs 7 and 10 of the complaint petition, but on a perusal thereof, it would appear that there in merely allegations have been made that the cheques in

> question were presented before the bank and they have been dishonoured. Allegations to satisfy the requirements of Section 138 of the Act might have been made in the complaint petition but the same principally relate to the purported offence made by the Company. With a view to make a Director of a Company vicariously liable for the acts of the Company, it was obligatory on the part of the complainant to make specific allegations as are required in law."

11. In the present case, the undisputed facts are that the petitioner had resigned as Additional Director of the accused no.1 company with effect from 15th December 2003; he has not signed the instruments in question; the instruments were dishonoured in the year 2005 and there are no averments in the complaint as to how and in what manner the petitioner was responsible for the conduct of the business of the Company or otherwise responsible to it in regard to its functioning. I am, therefore, of the view that the complaints become bad qua the petitioner, which deserve to be quashed.

12. In the premises aforesaid, these petitions are allowed. Criminal Cases No.400 of 2006, 401 of 2006 and 402 of 2006 and 403 of 2006 and the proceedings thereof pending before Metropolitan Magistrate, Court No.21, Ahmedabad are quashed and set aside. Rule is made absolute accordingly.

13. Before parting, it is required to be noted that the law of

Negotiable Instruments Act has been necessitated because of malpractices prevalent in our society pertaining to commercial transactions through financial instruments. It is absolutely necessary to see the statement of objects and reasons pertaining to this law enacted by the Parliament. It is no doubt true that it provides adequate safeguard to prevent harassment of honest drawers in such transactions that involve acceptability of cheque in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques due to insufficient arrangements made by the drawer.

13.1 However recent cases show that there has been non-application of mind in filing of cases, registering of cases and flooding the Court with such cases, which ultimately, due to lack of evidence, result into fruitless litigation. Evidence in this kind of cases rests on production of documents very vital to the case. One of such documents is Form No.32 filed by a director of a company, who has resigned and is required to follow the procedure as prescribed by law to inform the Registrar of Companies about his resignation as director from the said company.

13.2 In many cases the Directors may not have signed the instruments or they may not be concerned with the day-to-day affairs and management of the Company who are appointed as professional or

institutional Directors. Therefore if, at the initial stage, appropriate scrutiny is made, clogging of frivolous litigation or dead litigation that creates multiplicity of litigation could be curbed.

14. At this stage, before issuing necessary directions to take care of what this Court has observed in Para 13.1 of this order, it is important to refer to two decisions of the Hon'ble the Apex Court wherein, the Apex Court has laid emphasis on the fact that issuance of process is not an empty formality and that before issuing process, the Court concerned should bear in mind and take several important aspects into consideration.

14.1 The Hon'ble Apex Court in the case of ***M/s. Pepsi Foods Ltd. & anr. v. Special Judicial Magistrate & ors.*** reported in 1998(5) SCC 749, 1997(8) JT 708, 1997(6) Scale 610, 1997(9) Su0preme 279, 1998 SCC (Cri) 1400 it is held as under;

> "28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in

> bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused".

14.2 The Hon'ble Apex Court in the case of ***State of Orissa & anr. v. Saroj Kumar Sahoo*** reported in 2005(13) SCC 540(= ***(2006) 2 S.C.C. [Cri.] Page 272)*** in Para 10 has observed as under;

> "10. ..... Judicial process should not be an instrument of oppression, or needless harassment. The Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, lest it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly.....".

15. The trial Court shall, therefore, carry out proper verification before issuing summons in a criminal case under Section 138 of Negotiable Instruments Act. While registering the complaint, the following verifications are required ;

[1] The verification of a complaint on oath by the complainant is the first important step in the process of taking cognizance by the Court upon the complaint. The verification is not an empty

formality but, when a complaint is verified by the complainant on oath, then the verification would attach authenticity to the averments made in the complaint, and if found or proved false, then even cost can be imposed upon such complainant. Therefore, verification has to be in a proper manner, i.e. all the facts necessary to constitute the offence must be borne out from the verification and the factual aspect should also be made very amply clear by the complainant, so that the Court may not be misled by incomplete verification or incomplete details of facts necessary to take cognizance upon the complaint.

[2] If the complaint is by a Company, i.e. by a legal entity, then the Court should verify as to whether the person representing the Company has been duly authorized or not. On the date of the verification of the complaint itself, the Court should peruse the authorization, empowering a particular person to file the complaint on behalf of the legal entity.

[3] Whether the complainant has supplied complete postal address of the complainant as well as the complete postal address/s of the persons named as accused in the complaint or not and whether the said addresses are correct or not.

[4] Shall verify the statement of the complainant that all the accused persons who are named in the complaint are Directors / Partners of the firm / Company in question as on the date of the offence and / or the complaint and, as to whether they are liable under the Negotiable Instruments Act or not. It shall also verify the status of the accused person/s and the extent of involvement of the accused person/s in the commission of the alleged offence. Before a person can be made vicariously liable and is summoned before the Court, strict compliance of the statutory requirements should be insisted. In terms of Section 200 of the Cr.P.C., the Court should take care to see that the complainant makes a statement on oath as to how the offence has been committed and as to how the accused persons are responsible therefor. On appropriate verification of the complaint, ultimately, if it is found by the Court concerned that the complaint is frivolous or otherwise mala fide, the same may be dismissed u/s. 203 of the Cr.P.C..

[5] Whether the accused is the signatory to the instrument in question or not.

[6] There must be a specific averment in the complaint itself as regards the fact that the Payee of the cheque had issued the

statutory Notice to the Drawer and that the Drawer has received the statutory Notice. The Court should insist for some formal proof in the form of acknowledgment receipt, unless, the complainant, while verifying the complaint on oath, states that the accused has deliberately evaded the service of Notice or otherwise. In the absence of such averment in the complaint as well as the statement on oath during the course of verification, the complaint can straightway be dismissed u/s. 203 of the Cr.P.C..

[7] Whether the concerned Firm / Company, Society / Institution, Partner / Director or Proprietor are joined as parties or not.

[8] Whether the complaint has been filed within the period of limitation as prescribed under Section 138 of the Act.

[9] Whether there are any specific allegations against each accused or not in accordance with the ratio laid down in the cases of *Sabitha Ramamurthy & anr. v. R.B.S. Channabasavaradhya* reported in AIR 2006 SC 3086 (= 2006(1) SCC 581, 2006 AIR S.C.W. 4582, 2006 Cri. LJ 4602, 2006(9) Scale 212) and *Saroj Kumar Poddar Vs. State (NCT of Delhi)* reported in 2007(2) SCALE 36.

16. Registry is directed to circulate copy of this order to all the Courts below.

[K.S. JHAVERI, J.]

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